

The Rt Hon Boris Johnson
Prime Minister's Office
10 Downing Street
London
SW1A 2AA

13 November 2019

FOR YOUR URGENT ATTENTION
REQUEST FOR IMMEDIATE DISCLOSURE UNDER THE PRIME MINISTER'S
COMMON LAW DUTY TO DISCLOSE INFORMATION IN THE PUBLIC INTEREST

Dear Sir

**Re: The report of the Intelligence and Security Committee of Parliament
entitled "Russia"**

1. We act on behalf of the Bureau of Investigative Journalism ("**the Bureau**").
2. TBIJ is an independent, not-for-profit organisation that aims to "hold power to account". It aims "to inform the public about the realities of power in today's world... and is particularly concerned about the undermining of democratic processes and failures to accord with fair, legal and transparent practices." TBIJ has no corporate or political agenda.
3. This is a request to disclose the report of the Intelligence and Security Committee of Parliament entitled "Russia" ("**the Report**") to the Bureau. Please be advised that, for the reasons set out below, this request is made on the basis that the Prime Minister has a common law duty to disclose information in the public interest [*Kennedy v The Charity Commission* [2014] UKSC 20, [2015] AC 455]. This is not a request under any part of the Freedom of Information Act 2000 ("**the 2000 Act**") and should not be treated as such.
4. Please be aware that, should the Prime Minister decide not to disclose the Report within the timeframe set out in the final paragraph of this letter, we are instructed to challenge that decision by way of urgent application for judicial review.

Background

5. In or around March 2019 the Intelligence and Security Committee (“**the ISC**”) began consultations with the Security Service, the Secret Intelligence Service and GCHQ (“**the agencies**”) and the National Security Secretariat about the content of the Report. By October 2019 the ISC and the agencies reached agreement as to the publishable content of the Report. As of October 2019, the agencies had “no objection” to the text of the Report being published as it currently stands.¹
6. On 17 October 2019 the ISC submitted the Report to the Prime Minister.
7. On 4 and 5 November 2019 the Prime Minister indicated (through statements made by representatives of his government) that he would not consent to the publication of the Report until after the general election scheduled for 12 December 2019. On 5 November 2019 Parliament was dissolved in advance of the general election. As a result of the dissolution, there is currently no extant ISC.

The Legal Basis of this Request

8. Under section 3(2) of the Justice and Security Act 2013 (“**the 2013 Act**”) the ISC is empowered “make such... reports to Parliament as it considers appropriate concerning any aspect of its functions.” It “must lay before Parliament any report made by it to Parliament” (s.3(6)). The effect of making a report to Parliament is to place it in the public domain. The Prime Minister is empowered, under s.3(4), to limit publication of any matter within the report that he “considers would be prejudicial to the continued discharge of the functions of the Security Service, the Secret Intelligence Service, the Government Communications Headquarters or any person carrying out activities falling within section 2(2).”
9. At the current time, there is no extant ISC and no sitting Parliament. We suggest that:

1 <https://www.independent.co.uk/news/uk/politics/russia-conservative-party-brexit-intelligence-uk-report-national-security-money-a9185116.html>

- (a) So far as the Prime Minister's consideration of the limited reasons for non-disclosure in s.3(4) is concerned, this is of no relevance. He is now seized of that consideration. So far as consultation with the ISC is concerned, our understanding is that he has already received the views of the ISC on publication (namely that the entire Report can be published).
 - (b) So far as subsequent publication is concerned, it is not possible for the ISC to lay the Report before Parliament pursuant to s.3(6). Consequently, the scheme of publication set out in section 3 of the 2013 Act ("**the section 3 scheme**") cannot operate at this time. Indeed, given that it typically takes a substantial period of time after a new Parliament sits for a new ISC to be formed, it is unlikely that the section 3 scheme will be operable until well into 2020.
10. Given the unavailability of publication by the ISC under the section 3 scheme, the common law duty to disclose information in the public interest ("**the common law duty**") fills the lacuna. This is supported by, and inspired by, Parliament's clear expression in section 3 itself as to the necessity of publication, and the considerations to be taken into account when considering disclosure, of ISC reports.
11. The common law duty to publish falls on the Prime Minister for the following reasons:
- (a) He is the current possessor of the Report;
 - (b) He is currently seized of the s.3(4) consideration;
 - (c) The ISC has passed the Report to the Prime Minister for s.3(4) consideration and is therefore, in substance, functus officio in terms of the publication of the report (even if Parliament was still sitting);
 - (d) The Prime Minister's refusal to act is the only reason the Report has not yet been published;
 - (e) The Prime Minister is the only individual empowered by the section 3 scheme to prevent the publication of the Report;

- (f) The Prime Minister is therefore the most proximate stand-in for the ISC in the current context.
12. The Prime Minister has a common law duty to publish information when (a) that information is requested and (b) he weighs the public interest in publication against the public interest in refusing to publish. In the instant case the Prime Minister should be guided in his performance of the common law duty - and in particular in respect of what constitutes the public interest in refusing to publish - by the requirements of the section 3 scheme.

Public Interest

13. The public interest in disclosure of the Report clearly outweighs the public interest in refusing disclosure:
- (a) The Report concerns interference by a foreign power in UK politics, this alone marks it out as of exceptional public interest. It goes to the heart of the UK's state sovereignty.
- (b) The alleged interference is specifically in elections. The electoral process is essential to the UK constitution because the sovereignty of Parliament ("the stone upon which the UK's constitution is not writ"²) flows from the consent of the electorate [*Jackson v Attorney General* [2005] UKHL 56, §126; *R (Miller) v Prime Minister and Cherry v Lord Advocate* [2019] UKSC 41, [2019] 3 W.L.R. 589, §55]. Foreign interference in elections therefore strikes at the fundamental tenets of the UK constitution.
- (c) There is a public interest in disclosure that would promote public debate and meaningful participation in any aspect of the democratic process [*DCMS v IC*, IT, 29 July 2008, at §28; *Galloway v IC and NHS*, IT, 20 March 2009, at §70(d)]. Further, there is a particular interest where the disclosure will allow the public to meaningfully participate in important decisions [*DWP v IC*, 5 March 2007, at §97; *OGC v IC*, 19 February 2009, at §§152-162].

² Jeffrey Jowell, "Parliamentary Sovereignty Under the New Constitutional Hypothesis" Public Law, (Autumn 2006), pp. 562-579

- (d) The Report also concerns Russian interference in the Brexit referendum in 2016. This referendum is the trigger for historic and irreversible constitutional change (which, on the present facts, will occur by operation of law on 31 January 2020). There is a clear public interest in knowing whether that referendum result was obtained, even in part, as a result of foreign interference.
 - (e) In the instant matter there are substantial indications of Russian interference in UK politics and elections. Not least those revealed by a series of investigations by *The Guardian*³. This is not a case in which there is merely speculation about foreign interference. *The Guardian* has obtained substantial evidence and analysis. The clarification which the Report is expected to provide is therefore of the highest importance.
 - (f) Indeed, the government itself acknowledges the threat posed by Russia, not least as a result of at least one assassination and another attempt that the government believes Russian agents have carried out on UK soil.
 - (g) The allegations of Russian interference concern senior figures in the government. If these allegations are supported by the Report, then it is essential that such figures are held to account. The relative seniority of those involved leads to a heightened public interest in disclosure.
14. Further, there is a particular public interest in publication of the Report in advance of the general election scheduled for 12 December so that voters can take the contents of the Report into account when making their decision for whom they will cast their vote and, importantly, on what basis they will decide.
15. The public interest considerations in favour of disclosure clearly outweigh those against disclosure. The Report has already been considered by both the agencies and, as we understand it, the appropriate officials within the Cabinet Office. All of these reached the conclusion that the Report, as presented to the

³ See, for example: <https://www.theguardian.com/politics/2019/nov/04/no-10-blocks-russia-eu-referendum-report-until-after-election>

Prime Minister, could be published without prejudice to the discharge of the functions of the agencies.

Freedom of Information Act 2000

16. The Freedom of Information Act 2000 does not provide an appropriate mechanism for consideration of this request. That statute provides for a public authority (in this case, the Prime Minister) to have 20 working days to consider a request and a further 20 days to consider the balance of public interest if he believes a relevant exemption applies under that Act. This period extends beyond both the date of the general election and the statutory period for challenging the result of that election. The Prime Minister is, therefore, asked to consider this request under his common law duty.

Time for Response

17. The Prime Minister typically takes 10 working days to approve an ISC report for publication where that report has already been considered and approved by security services and Cabinet Office officials. That period expired on 31 October 2019.
18. Moreover, it is imperative that the Report be published in good time before the general election on 12 December.
19. Further, as indicated earlier in this letter, should the Prime Minister decide not to publish the Report, it is our intention to challenge that decision by way of urgent application for judicial review. Such challenge must be capable of giving effective relief, namely resulting in publication before the general election.
20. For all those reasons, we ask that the Prime Minister respond by **4pm on Tuesday 19 November 2019**. Please be advised that, should no response be received, we may issue an urgent application for judicial review in the High Court with no further notice.

Address for response:

21. Rosa Curling, Leigh Day Solicitors, Priory House, 25 St John's Lane, London, EC1M 4LB (reference:

Yours faithfully

Leigh Day

Cc: Public Law Team, Government Legal Department